(24)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 116

DESPATCH SHOPS, INC.,

Petitioner,

against

VILLAGE OF EAST ROCHESTER, GEORGE SCHREIB, Mayor of the Village of East Rochester, LEE ARCURI, HAROLD L. BRAINERD, HAROLD KITCHEN and LLOYD V. WOOD, the last four being Trustees of the Village of East Rochester,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER FOR WRIT OF CERTIORARI

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APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-2342

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REPLY BRIEF

This petitioner for a writ of certiorari to review the determination of the Court of Appeals of the State of New York in this matter, in accordance with subdivision 4(a) of Rule 38 of the Rules of this Court herewith submits this brief, in reply to that submitted on behalf of the Respondent-Village.

The issue presented by the petition, succinctly stated, is whether a taxpayer, which is entirely excluded from any benefit from a proprietary venture proposed to be undertaken by a municipality, may nevertheless be subjected to taxation to make up any deficits which may occur from the operation of the project (Petition, p. 4).

The issue is not, as might be implied from a reading of the Respondent's brief, whether a municipal corporation may, in the exercise of a governmental function, incidentally offer, as a "sideline," benefits to certain taxpayers and not to others. Thus, the brief in opposition states that the proposed municipal electric plant and system, for the construction of which the Village would approach its constitutional debt limit and incur a long-term bonded indebtedness, would be built "for the principal purpose of operating its water system; the lighting of the streets and public buildings; and other Village purposes" and simply "as an incident * * * sell the excess to private consumers" (Respondent's brief, p. 3; see also, p. 23). Reference to the record, however, quickly dispels any such contention.

Whatever may have prompted the initiation of this village project (Respondent's brief, p. 3), the plan was to build an electric generating plant and distribution system to supply energy to the inhabitants of the municipality—with the exception of this petitioner—and also to furnish street lighting and other municipal needs. Thus the specifications for the proposed plant, in accordance with which the ordinance, as submitted to the voters, provided the project is to be constructed (R. 26; 501), state:

> "It is proposed to install a complete electric generating station and distribution system within the corporate limits of the Village of East Rochester for the purpose of producing electric energy and rendering electric service *to the inhabitants of the village* and to supply street lighting and other municipal requirements" (R. 494; emphasis supplied).

The report of the engineer commissioned to survey the project and prepare the plans and specifications points out that "the consumers of electric utility service in your village have every right to decide by their vote whether they shall continue to receive the service from a private corporation or to operate their own utility as a municipal enterprise" (R. 507), and that "one of the chief reasons for establishing a municipally owned electric system is to *lower the cost of electric service to the private consumers* and for municipal use" (R. 569; emphasis supplied). The pamphlet published and circulated prior to the election by the individual respondents listed as the first reason why the vote on the proposition should be favorable that the erection of a village power and light system would "reduce electric rates" (R. 49). Furthermore, from what source would the revenues, which are to be used first for the payment of the expense of operating and maintaining the project and for the payment of the principal of and interest on the bonds (R. 31), come except from private consumers?

Again, on page 4 of the brief it is said that the cost of the project, "with the generating plant specified and a distribution system adequate to serve all, *including D[espatch] S[hops]*", was $360,000. This assertion seeks to get away from the concession of counsel made at the trial that "the plant which is provided for in our plans and specifications, so far as generating capacity is concerned, would not supply Despatch Shops" (R. 249).

In a further attempt to avoid the flagrant omission of this petitioning taxpayer from any service from this plant, resort is made to the argument that the Village could purchase power from some outside source to supply the demands of the Shops (Brief, p. 5). That such

an assertion is purely a makeshift and an afterthought to escape the arbitrary treatment accorded this large taxpayer is also evident by examination of the record.

Nothing was said in the ordinance or resolution about the possible purchase of power to supply the Village or any of its inhabitants through a municipal distribution system. All that was said with reference to purchased power appears in the engineer's report wherein is discussed the possibility "as an alternative to constructing a power generating station" of "erecting the distribution system and purchasing energy" (R. 572). But even the engineer concluded that such an alternative proposition was impossible of consideration until it should be ascertained "if the power can be purchased at all" (R. 573). Moreover, the ordinance submitted to the voters mentioned nothing about the possibility of supplemental purchased power but stated that the proposition was "for the construction in and for the Village of East Rochester of a plant for the generation and a system for the furnishing and transmission of electrical energy for light, heat and power to the Village and for compensation to its inhabitants for municipal, domestic, residential, commercial and industrial uses" (R. 501; 26; 32; 35). And this single proposition was submitted despite the fact that the engineers suggested that the local law to be submitted for electoral approval should provide "for the purchase of electric energy as an alternative to the building of a generating station." (R. 577). Hence, it seems rather futile at this late date to contend, if only by way of veiled inference, that this glaring defect in the project could be corrected by some such expedient as the purchase of power.

A consideration of the record and all the attendant circumstances present therein leaves but one conclusion which no artful dissembling can eradicate—and that is, that this petitioner was definitely excluded from all service from this proposed plant and system. There can be no doubt, as pointed out in the petition herein (p. 7), that service was not only not contemplated for this consumer but that all such possibility thereof was removed. Thus, the engineer who made the preliminary survey and prepared the plans and specifications blandly states that he eliminated "this one large industrial consumer" from his considerations (R. 517; see also R. 525).

The Village Disregards All Well Known Distinctions Between the Dual Functions of Municipal Corporations

Without exception every case relied upon in the opposing brief dealt with the performance of purely governmental functions, for which all taxpayers must contribute ratably regardless of any particular individual benefit. In connection with the erection and maintenance of public buildings, the protection of the inhabitants against disease and unsanitary conditions, the exercise of the police power, the operation of a fire department, the promotion of education, and the like, the municipality acts as an agent for the state for governmental purposes (see *Trenton* v. *New Jersey*, 262 U. S. 182, 191). But in the instance concerned in the present application the Village is acting as an organization to care for local needs in its private or proprietary capacity.

This was clearly pointed out in one of the cases cited by the Respondent, *Village of Tupper Lake* v. *Maltbie*, 257 App. Div. 753, wherein the Court said at p. 757:

> "While it may be true that the village owes a duty to light the streets, if that be so considered, then it must also be considered that such duty devolves upon the village in its governmental capacity, while *as the owner of the plant it acts in its proprietary capacity.*" (Emphasis supplied.)

See also:

Los Angeles Gas & Electric Co. v. *City of Los Angeles,* 241 Fed. 912, 918-919, affirmed 251 U. S. 32;

Cf. City of New York v. *New York Telephone Co.,* 278 N. Y. 9, 14.

There is no question but that the erection and operation of a municipal electric plant and system is a "public purpose", as the Village argues (Brief, pp. 22-23). And this is so, whether it is supplying energy for strictly municipal needs or to inhabitants of the community. But, as pointed out above, the Village in carrying out such "public purpose" by so supplying such electricity would be exercising its purely private powers, as distinct from those which it performs as a strictly governmental organization. And while the Village unquestionably may engage in this proprietary venture, it cannot in so doing make service available to some taxpayers and not to others and at the same time hold the property of those discriminated against liable for assessment to make up any operating deficits. That is the complaint urged by this petitioner on this application.

So far as concerns the alleged "community" benefits, such as greater street lighting and lesser costs for the supplying of energy to public buildings and other mu-

nicipal operations (see Respondent's brief, p. 7), Despatch Shops, Inc. would share in any such benefits with the rest of the community. But one of the primary purposes of the project is to furnish electric energy generated at the plant to all the inhabitants of the Village—except this petitioner—for their personal and individual needs.

The only justification for such exclusion is that Despatch Shops uses a large amount of electric power in the operation of its business. However, if that is a valid excuse for so discriminating, there is nothing to prevent a municipality from proposing to construct a plant to supply, say only residential consumers and not any commercial or industrial consumers, but nevertheless subject the property of these business people to taxation to pay for any deficiencies from the operation and maintenance of such a plant and system for a "selected" group in the community. Any such proposal, as well as the instant one, runs counter to our Federal Constitutional safeguards.

The authorities cited in support of Respondent's contention are clearly not applicable to the factual situation presented in this application. Thus in *Missouri Pacific Railroad* v. *Western Crawford Road Improvement Dist.*, 266 U. S. 187, the State Legislature had created the improvement district and the commissioners made a study of the work to be done, the cost thereof and an estimate of the benefits and burdens. After this preliminary survey the project was abandoned because it was concluded that the cost of the proposed improvement would probably exceed the benefits. In making these studies the commissioners naturally incurred some expenses and, pursuant to the act creating the district, a tax was

levied on an *ad valorem* basis. The sole objection of the railroad was that the tax was not assessed in proportion to the benefit which it was estimated would have accrued if the improvement had been made. In overruling such contention this Court pointed out that "road building is a public purpose which may be effected by general taxation" and that "the preliminary inquiry whether it is desirable to construct the road is one in which all landowners within the district are interested" and concluded that "there is here no suggestion of that flagrant abuse or purely arbitrary exercise of the taxing power against which the Federal Constitution affords protection." (266 U. S. at p. 190).

In this instance, however, it is just such an abuse and purely arbitrary exercise of power—in subjecting this petitioner to taxation to make up deficits in the operation of a purely commercial enterprise although it is to be excluded from all the benefits which all other inhabitants, taxpayers and non-taxpayers alike, may enjoy—about which complaint is made.

Miller & Lux, Inc. v. *Sacramento & San Joaquin Drainage District,* 256 U. S. 129, is to the same effect as the *Western Crawford Road Improvement* case, *supra.* And in that case the Court, in denying the petition for certiorari and dismissing the writ of error, specifically pointed out (256 U. S. at p. 131) that the allegations of the complaint therein were "wholly insufficient to raise the issue in respect to arbitrary legislative action presented by *Myles Salt Co.* v. *Iberia & S. M. Drainage Dist.,* 239 U. S. 478."

Paducah-Illinois Railroad Co. v. *Graham,* 46 F. (2d) 806 (W. D. Ky.), instead of supporting Respondents' contention, reaffirms our position. There a county board of education laid off boundaries of a consolidated com-

mon school district—a governmental function as distinct from proprietary—and an election was held in such consolidated district on whether or not to levy a tax to provide grounds and buildings and other school purposes within the district. The vote was in favor of the tax. Included in the district was acreage covered by the Ohio River and the only improvement and the only taxable property of any value on or over that part of the acreage covered by the River was the railroad company's bridge. Despite the finding that the tax was a general tax levied upon the assessed value of all property in the district, without regard to benefits accruing to the property taxed, and not a special assessment or a local improvement tax, the Court nevertheless declared the creation of the district and the levy of the tax void for the reason that the "inclusion of the plaintiff's railroad bridge in the taxing district is so unnatural and so unreasonable as clearly to show that the sole purpose of the inclusion was to add to the taxable value of the property in the district" and "that this action of the board was arbitrary and unreasonable, and violates plaintiff's federal constitutional rights" (46 F. [2d] at pp. 810-811).

Here we have the same purpose sought to be accomplished by a reverse means. By the ordinance under which this village electric plant and system are to be constructed any moneys, not derived from the operating revenues of the project, "necessary to pay the principal of and interest on said bonds shall be raised by tax on the taxable property in said Village" (R. 31; 29). The petitioner pays approximately one seventh of all taxes collected in the Village (R. 131; 156-157; 204) and will thus be obligated to make up one seventh of all annual deficits from the operation of the plant. Nevertheless, as

has been pointed out above, it is excluded from using any of the energy to be generated from the plant—although all others have the right to take and use such energy—and in fact, as the proposition was submitted and voted upon, from having any benefit whatsoever from the project. Such "action of the board was arbitrary and unreasonable, and violates [petitioner's] federal constitutional rights."

Houck v. *Little River Drainage District*, 239 U. S. 254, and kindred cases, dealt with governmental subdivisions of a state which, as this Court pointed out, "exercise the granted powers within their territorial jurisdiction 'as fully, and by the same authority, as the municipal corporations of the state exercise the powers vested by their charters.'" The district was "constituted a political subdivision of the state for *the purpose of performing prescribed functions of government*" (239 U. S. at p. 262). The expenses of such enterprises can, of course, be met by general taxation, or if it is deemed desirable, by the creation of tax districts, to meet the authorized outlays—in that instance a preliminary tax to cover initial costs of survey, etc., which it "was not necessary to base * * * upon special benefits accruing from a completed plan" as "these outlays for organization and preliminary surveys could well be considered specially to concern the district, as constituted, as highways or public buildings or plans for the same (whether consummated or abandoned) could be said to concern counties or towns." (239 U. S. at p. 266).

In *Mount St. Mary's Cemetery Association* v. *Mullins*, 248 U. S. 501, it was found on the evidence that the sewers proposed to be constructed actually benefited the plaintiff's lands in that the sewers served to carry away surface water therefrom and there was no evidence that the cemetery would not be benefited as to sanitation as

a result of the project. Here, we have a situation wherein it is established that the taxpayer would not receive any benefit from the plant and yet would have to stand behind it. And hence it is believed we fall squarely within the principle of *Myles Salt Co.* v. *Iberia & St. Mary's Drainage Dist.*, 239 U. S. 478, in that it is sought "to embrace property in no wise benefited within the limits of a [taxing] district" (248 U. S. at p. 505).

Conclusion

We reiterate that we are here confronted with the anomolous situation of a municipality seeking to embark on a purely private enterprise to supply a service to all the inhabitants of the community save one—this petitioner—and yet pledge the taxable property of this petitioner to stand behind the bonded indebtedness necessary to be incurred to construct the plant and system. This is a case of first impression, so far as we have been able to discover, wherein a municipal corporation has endeavored to engage in such a business for the ostensible benefit of most of the inhabitants but to the exclusion of some. In the words of the dissenting judges of the New York Court of Appeals such "will result in an unconstitutional taking of property through illegal taxation" (R. 700).

Under these circumstances, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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